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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/806,545	03/23/2004	Gholam Peyman	PMAN / 26CIP	2494

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EXAMINER	
MAEWALL, SNIGDHA	
ART UNIT	**PAPER NUMBER**
1615	

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	02/20/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

Office Action Summary	Application No.	Applicant(s)	
	10/806,545	PEYMAN, GHOLAM	
	Examiner	Art Unit	
	Snigdha Maewall	1615	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☐ Responsive to communication(s) filed on _____.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-36* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-36* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date *6/25/04*.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Summary

1. Receipt of IDS filed on 06/25/2004 is acknowledged.

Informalities

2. The specification is objected to because it contains hyperlink to kraftsfood.com. The disclosure is objected to because it contains an embedded hyperlink and/or other form of browser-executable code. Applicant is required to delete the embedded hyperlink and/or other form of browser-executable code. See MPEP § 608.01.

Double Patenting

3. A rejection based on double patenting of the "same invention" type finds its support in the language of 35 U.S.C. 101 which states that "whoever invents or discovers any new and useful process ... may obtain a patent therefor ..." (Emphasis added). Thus, the term "same invention," in this context, means an invention drawn to identical subject matter. See *Miller v. Eagle Mfg. Co.*, 151 U.S. 186 (1894); *In re Ockert*, 245 F.2d 467, 114 USPQ 330 (CCPA 1957); and *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970).

A statutory type (35 U.S.C. 101) double patenting rejection can be overcome by canceling or amending the conflicting claims so they are no longer coextensive in

scope. The filing of a terminal disclaimer cannot overcome a double patenting rejection based upon 35 U.S.C. 101.

Claim 15 is provisionally rejected under 35 U.S.C. 101 as claiming the same invention as that of claim 17 of copending Application No. 10/744269. This is a double patenting rejection.

This is a provisional double patenting rejection since the conflicting claims have not in fact been patented.

4. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

5. Claims 1-10 are provisionally rejected on the ground of non-statutory obviousness-type double patenting as being unpatentable over claims 17-19 of

copending Application Number 10/744269 in view of Gori (U.S. Patent No. (4,784,861). Although the conflicting claims are not identical, they are not patentably distinct from each other because both applications claim a kit comprising a composition of wheat bran, wheat, molasses, corn derived maltodextrin and instructions for consuming an appetite-suppressant amount of the composition with or at an interval prior to at least one meal to suppress hunger and thereby facilitate reduction of the total caloric intake during the meal. Gori discloses that weight-control formulations can be supplied in the form of packaged kit (column 3, lines 52-54). It would have been obvious to the one of ordinary skilled in the art to make a kit comprising an aforementioned composition as claimed in the instant application.

This is a provisional double patenting rejection since the conflicting claims have not in fact been patented.

Claim Rejections - 35 USC § 112

6. The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter, which the applicant regards as his invention.

7. Claim 36 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The instant claim 36 contains the trademark/trade name "POSTUM". Where a trademark or trade name is used in a claim as a limitation to identify or describe a

particular material or product, the claim does not comply with the requirements of 35 U.S.C. 112, second paragraph. See Ex parte Simpson, 218 USPQ 1020 (Bd. App. 1982). The claim scope is uncertain since the trademark or trade name cannot be used properly to identify any particular material or product. A trademark or trade name is used to identify a source of goods, and not the goods themselves. Thus, a trademark or trade name does not identify or describe the goods associated with the trademark or trade name. In the present case, the trademark/trade name is used to identify/describe food composition comprising natural coffee flavor and, accordingly, the identification/description is indefinite.

Claim Rejections - 35 USC § 102

8. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

9. Claims 1-10 and 12 are rejected under 35 U.S.C. 102(b) as being anticipated by Kais et al. U.S. Patent No. (5,516,524).

Kais et al. disclose an ingestible laxative composition comprising dioctyl sulfosuccinate and bulk fiber such as psyllium, bran, malt soup, guar and methylcellulose (abstract). The composition has a carrier material comprising flow agents, starches, dextrin, maltodextrins emulsifiers, oat bran, wheat bran, or rice bran to add body and flavor to

the composition. (column 4, line40-45). Compositions can be used for constipation, a single dose or for daily fiber therapy (column 4 ,lines 21-22). The laxative compositions are preferably selected from the group consisting of drink mixes, tablet and capsules. Solid dose forms include tablets, liquid containing capsules and hard and soft shelled capsules(column 4, lines, 3-10). The reference further describes the method for treating constipation in humans or lower animals (column 4, lines 59-62). Example III illustrates composition comprising lecithin oil, molasses (0.39%), corn oil, cornstarch, oat hull fiber (6.42%), wheat flour sodium bicarbonate and water. Kais et al. further disclose that the preferable percentage of the dioctyl sulfosuccinate can be from about 0.5% to about 5%. Food gums are disclosed in (column 5, lines 10-11 and column 6, lines 13-24).

Although the references do not disclose the amounts as claimed by Applicant, the amount of a specific ingredient in a composition is clearly a result effective parameter and would be obvious for a person of ordinary skill in the art would routinely optimize. It would have been customary for an artisan of ordinary skill to determine the optimal amount in order to best achieve the desired results. The adjustment of particular conventional working conditions (e.g., determining a result-effective amount for a given therapeutic effect taught therein) is deemed merely a matter of judicial selection and routine optimization, which is well within the purview of the skilled artisan.

10. Claims 13 and 14 are rejected under 35 U.S.C. 102(b) as being anticipated by Gori. (U.S. Patent No. (4,784,861).

Gori discloses a packaged weight-control powder as a food additive to be employed

before eating comprising roasted wheat or fiber.

The powder is formed of a mixture of oat, wheat and corn brans (roasted or unroasted) mixed with pectin, guar gum psyllium and cutin. Mineral supplements are employed to replace those removed by the fibers of the brans. The powder is prepared in an atmosphere of less than 50% humidity and is packed in individual water-proof packages (abstract and examples on column 4 to column 7.) Roasted Wheat Fiber/Bran is a fully roasted product that gives it great stability and adds to its crispness and mouth feel. (column 7, lines, 9-11).

11. Claims 32-36 are rejected under 35 U.S.C. 102(b) as being anticipated by Parliment et al. (U.S Patent No. 3,886,297).

Parliment et al. discloses enhancement of the flavor of foodstuff (abstract). Parliment et al. discloses that the woody compounds are particularly useful for enhancing the flavor of cereal based beverages prepared from roasted cereals such as wheat, rye, barley, and the like. One such product, marketed under the trademark "Postum" either regular or coffee flavored which is a dry water extract of roasted wheat, barely, and molasses. Postum has a natural coffee flavor. Coffee flavors reduce the molasses (caramel flavor) characteristic of "Postum" (column 5, lines thirty one to forty).

With respect to the limitation "appetite suppressant" it is the examiners position that the limitation " appetite suppressant" is a future intended use and therefore does not bear any patentable weight.

Claim Rejections - 35 USC § 103

12. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

13. Claim 11 is rejected under 35 U.S.C. 103(a) as being unpatentable over Kais et al. (U.S Patent No.5,516,524) in view of Gori (U.S Patent No. 4,784,861) . Teachings of Kais et al. has been discussed above.

Kais et al. do not disclose roasted wheat or fiber. However, (U.S Patent No. 4,784,861) to Gori discloses a packaged weight-control powder as a food additive to be employed before eating comprising roasted wheat or fiber.

The powder is formed of a mixture of oat, wheat and corn brans (roasted or unroasted) mixed with pectin, guar gum psyllium and cutin. Mineral supplements are employed to replace those removed by the fibers of the brans. The powder is prepared in an atmosphere of less than 50% humidity and is packed in individual water-proof packages (abstract and examples on column 4 to column 7.) Roasted Wheat Fiber/Bran is a fully roasted product that gives it great stability and adds to its crispness and mouth feel. (column 7, lines, 9-11).

It would have been obvious to one of ordinary skilled in the art at the time the invention

was made to use roasted oat, wheat or corn/ fiber as taught by Gori in the compositions provided by Kais et al. because the roasted wheat/fiber provide great stability and adds crispness and good mouth feel.

14. Claims 15-21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kais et al. (U.S patent No. 5,516,524.) in view of Gori (U.S Patent No. 4,784,861). Teachings of Kais et al. has been discussed above. Kais et al. does not disclose kit comprising their compositions.

Gori discloses a packaged weight-control powder as a food additive to be employed before eating comprising roasted wheat or fiber (column 2, lines 8-13 and column 3, lines 46-60).

Gori discloses an improved method to provide the formulation of the food product comprising a mixture of oat, wheat and corn brans (roasted or unroasted) mixed with pectin, guar gum psyllium and cutin. Mineral supplements are employed to replace those removed by the fibers of the brans. The powder is prepared in an atmosphere of less than 50% humidity and is packed in individual water-proof packages (abstract and examples on column 4 to column 7).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to incorporate the composition disclosed by Kais et al. in the kit as disclosed Gori for the ease of convenience and administration and packaging. A skilled artisan would thus have been motivated to provide a kit comprising wheat bran, wheat, molasses, and corn-derived maltodextrin in an oral dosage composition, and instructions for orally ingesting an appetite-suppressant amount of the composition.

Although the references do not disclose the amounts as claimed by Applicant, the amount of a specific ingredient in a composition is clearly a result effective parameter and would be obvious for a person of ordinary skill in the art would routinely optimize. It would have been customary for an artisan of ordinary skill to determine the optimal amount in order to best achieve the desired results. The adjustment of particular conventional working conditions (e.g., determining a result-effective amount for a given therapeutic effect taught therein) is deemed merely a matter of judicial selection and routine optimization, which is well within the purview of the skilled artisan.

15. Claims 22, 24-31 are rejected under 35 U.S.C.103(a) as being unpatentable over Kais et al. (U.S Patent no. 5,516,524) in view of Parliment et al. (U.S Patent No. 3,886,297).

The teachings of Kais et al. has been discussed above. The reference does not teach composition comprising natural coffee flavor.

Parliment et al. discloses enhancement of the flavor of foodstuff (abstract). Parliment et al. discloses that the woody compounds are particularly useful for enhancing the flavor of cereal based beverages prepared from roasted cereals such as wheat, rye, barley, and the like. One such product, marketed under the trademark "POSTUM" either regular or coffee flavored which is a dry water extract of roasted wheat, barely, and molasses. "POSTUM " has a natural coffee flavor. Coffee flavors reduce the molasses (caramel flavor) characteristic of "POSTUM" (column 5, lines thirty one to forty.)

It would have been obvious to one of ordinary skill in the art at the time the invention was made to use natural coffee flavor (for instance, "POSTUM")to the composition to

enhance the coffee flavor and mask the undesirable taste of molasses.

Although the references do not disclose the amounts as claimed by Applicant, the amount of a specific ingredient in a composition is clearly a result effective parameter and would be obvious for a person of ordinary skill in the art would routinely optimize. It would have been customary for an artisan of ordinary skill to determine the optimal amount in order to best achieve the desired results. The adjustment of particular conventional working conditions (e.g., determining a result-effective amount for a given therapeutic effect taught therein) is deemed merely a matter of judicial selection and routine optimization, which is well within the purview of the skilled artisan.

16. Claim 23 is rejected under 35 U.S.C.103(a) as being unpatentable over Kais et al. (U.S Patent no. 5,516,524) in view of Parliment et al. (U.S Patent No.3,886,297) further in view of Gori (U.S Patent no. 4,784,861).

Teachings of Kais et al., Parliment et al. and Gori have been discussed above.

Gori as discussed above teaches that the roasted Wheat Fiber/Bran is a fully roasted product that gives it great stability and adds to its crispness and mouth feel. (column 7, lines, 9-11). It would have been obvious to the one of ordinary skilled in the art to utilize the roasted wheat or wheat bran in the composition forwarded by Kais et al. as there would have been a reasonable expectation of success in achieving a product comprising roasted wheat bran, wheat ,molasses, corn-derived maltodextrin and natural coffee flavor with a better mouth feel.

17. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Snigdha Maewall whose telephone number is (571)-272-6197. The examiner can normally be reached on Monday-Friday from 8:30 A.M to 5:00 P.M.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Woodward, can be reached on (571) 272-8373. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

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